SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

DISTRICT OF COLUMBIA v. JOHN BARBUSIN, Defendant	Docket No. 2012 CDC 000913 Felony 2 Calendar #6 Judge Stuart G. Nash

ORDER

On July 29, 2013, the Court dismissed this case as a consequence of the government's failure to disclose matcrially exculpatory information. Before the Court is Government's Amended Motion for Reconsideration, filed August 2, 2013. For the reasons set forth below, the government's motion is **DENIED**.

At approximately 12:00pm on Thursday, July 25, 2013, the third day of trial in this matter, it became apparent during cross-examination of the fifth defense witness that the government had failed to disclose to the defense an e-mail authored by that witness. The Court expressed concern that the document in question was exculpatory evidence that should have been disclosed to the defense prior to trial (e.g. "Brady" information; see Brady v. Maryland, 373 U.S. 83 (1963)). The Court recessed the trial for an hour and a half to allow the government to formulate its position on whether the document was, in fact, exculpatory, and if so, whether it was appropriate to impose a sanction against the government for its non-disclosure.

When the trial resumed that same afternoon, the trial prosecutor was joined by the Deputy Attorney General of the Public Safety Division of the Office of the D.C. Attorney General. The government continued to assert that the document in question was not Brady evidence. At that time, the Court stated, "It is hard to imagine a more relevant, material

document to the [principal defense in this case]." The Court further stated, "As I sit here, it is unimaginable to me that, after briefing the issue and hearing arguments on it, I wouldn't find this would be [exculpatory evidence subject to mandatory disclosure]." Nevertheless, at the request of the Deputy Attorney General, the Court recessed the trial for four days, until the following Monday, to allow the government to brief the issue.

On Friday, July 26, the government filed a 20-page brief, with 14 pages of attachments, defending the non-disclosure of the document in question. Unlike all previous government filings, this brief was signed by the Deputy Attorney General. In that brief, the government asserted, unequivocally, "the e-mail in question does not provide any exculpatory information," and therefore was not subject to the government's disclosure obligations. The brief went on to make the remarkable claim that it was actually the defendant who was at fault, for having failed "to comply with his obligations" to seek out the document bimself and produce it to the government.

On the afternoon of Monday, July 29, following oral argument on the motion, the Court dismissed the case. The Court indicated that it had considered every possible sanction short of dismissal, but found each such sanction inadequate to address the non-disclosure. The Court based its decision, in part, on the government's ongoing failure to even acknowledge that the document was exculpatory. As the Court stated from the bench:

> The most troubling thing at this point is . . . [when] the judge provides a couple days for the Office [of the Attorney General] to reflect on whether it is Brady or not, understanding now how valuable the defense would view that evidence, and for it to go all the way up the chain of command within the [Attorney General's Office] and for me to get a pleading signed by the [Deputy Attorney General] that persists in calling this evidence non-exculpatory – [that] suggests to me that the Attorney General's Office has a different view of Brady that the rest of us do, and in my view, a view about Brady that is absolutely wrong. . . . For the government to come back and say, we've thought it over, all the way up to the level of the Deputy Attorney General, and we do not think this is Brady – I don't see a way

> forward other than to express on behalf of the Court that this [an] unacceptable way of prosecuting people. . . . I have considered long and hard about any possible sanction that I could impose short of dismissal of the case, and I find each of those sanctions inadequate to address the nature of this interpretation of Brady on behalf of the Attorney General's Office.

In dismissing the case, the Court made the following findings: (1) that the evidence in question was "extremely exculpatory"; (2) that the evidence was not known to the defense; (3) that the evidence was in the possession of the prosecutor prior to the start of the trial; (4) that the government made a conscious decision not to disclose the evidence on the mistaken belief that it was not exculpatory evidence subject to disclosure; (5) that there was no reasonable basis for the government's belief that the evidence was not exculpatory and subject to disclosure; and (6) that the evidence was material to the central defense advanced by the defendant.

On Friday, August 2, the Court received the Government's Motion for Reconsideration, which represented that, "the OAG leadership, including the Attorney General personally, . . . upon careful reflection and further research . . . now recognizes . . . that the emails were both material and exculpatory, and that withholding may have had the potential to cause prejudice to the defense." In light of the government's change in position, and its representation that it is "redoubling and reissuing its Brady-related training guidance in the wake of this matter," the government requests that the Court reconsider its sanction of dismissing the case.

The Court is certainly gratified that the Office of the Attorney General has finally recognized that it had an obligation to produce the document in question to the defense. Certainly, this recognition will restore some of this Court's faith in prosecutions pursued by the Office of the Attorney General. However, it cannot be overstated that this was not a close call. It simply should not have required the personal intervention of the Attorney General and his senior leadership to get to the right answer on this question.

The fact of the matter is that it was only the Court's extraordinary step in dismissing the case that apparently elevated the issue to a level within the Office of the Attorney General that caused that Office to reach a decision that was readily obvious to any neutral observer. The fact that the Office of the Attorney General has now reached that decision does not persuade the Court that some lesser sanction is appropriate. To the contrary, it suggests that the Court's original decision was both warranted and necessary.

Since the Court's dismissal order, the Office of the Attorney General has taken the position, both in pleadings and in the press, that dismissal of this case is lamentable because the case purportedly advanced the principle that "those charged with enforcing the law have a responsibility to obey it as well." The Office of the Attorney General appears oblivious to the irony of advancing that position in connection with a case in which they themselves were found to have blatantly transgressed one of the core Constitutional protections provided to the criminally accused – a finding they now "recognize and accept."

This court remains entirely confident that its order dismissing this case strikes a blow, in its own way, in furtherance of the principle that the Office of the Attorney General desires to champion – that no arm of law enforcement should exist above the law.

It is hereby this 6th day of August, 2013,

ORDERED, that Government's Amended Motion for Reconsideration is **DENIED**.

Stuart G. Nash
Judge, D.C. Superior Court

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